ESTTA Tracking number: **ESTTA692851**

Filing date: **09/01/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91222801
Party	Plaintiff Lumber Liquidators Services, LLC
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Date	09/01/2015
Attachments	BELLA BASEMENTS MOTION.pdf(194471 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

LUMBER LIQUIDATORS SERVICES, LLC	)	
Opposer,	)	Application Serial No. 86382985
v.	)	Mark: BELLA BASEMENTS
PETER PANDOLFI DBA BELLA BASEMENTS	)	Opposition No. 91222801
Applicant.	)	

MOTION FOR JUDGMENT ON THE PLEADINGS AND REQUEST FOR STAY

Opposer Lumber Liquidators Services, LLC. ("Opposer"), pursuant to Federal Rule of Civil Procedure 12(c), TBMP 504, and 37 CFR § 2.127(d), moves for judgment on the pleadings against Peter Pandolfi doing business as Bella Basements ("Applicant") and stay of the action during the motion's pendency:

Background Facts

Applicant is the owner of Application Serial No. 86382985 for the mark BELLA BASEMENTS filed with the PTO on September 2, 2015 ("Applicant's Mark"). *See Exhibit B to Notice of Opposition.* Applicant filed the instant application with the PTO on an in-use basis (Section 1(a)) and, by declaration, claimed dates of first use anywhere of January 1, 2014 and dates of use in commerce of January 1, 2014.

Application No. 86382985 was published in the U.S. Patent and Trademark Office's ("PTO") *Official Gazette* on March 17, 2015. On April 1, 2015, Opposer requested and was granted an extension of time to file an opposition. Opposer timely filed its Notice of Opposition on July 15, 2015.

In his answer, Applicant admitted, among other things, the following allegations of the notice of opposition as true:

Notice of Opposition	**Applicant's Answer**
8. Upon information and belief, Applicant's use and plans for use of its mark are in the Denver and nearby locations only in the state of Colorado.	8. Applicant admits that the current use of applicant's mark is localized to the Denver CO area, but denies that this is the future plan of the applicant.
9. Upon information and belief, Applicant, as of the filing date of Application Serial No. 86382985, had not used and has not claimed to use Applicant's Mark in any state other than Colorado. As of the filing date of Application Serial No. 86382985, Applicant had not used Applicant's Mark in interstate commerce.	9. Applicant admits ¶9.
13. Upon information and belief, Applicant had not used Applicant's mark in commerce that may be regulated by the U.S. Congress as of the filing date of the subject application.	13. Applicant admits with regards to ¶13, that it has not yet used applicant's mark in interstate commerce, but has intent to expand once mark is federally registered and business conditions exist to do so.

Legal Rule

To apply for registration under Lanham Act § 1(a), the mark must be "used in commerce in use in a type of commerce that the U.S. Congress can regulate." 15 U.S.C. §§ 1051(a)(1), 1127; *see also Aycock Eng'g, Inc. v. Airflite, Inc.*, 560 F.3d 1350, 1357 (Fed. Cir. 2009). Use in commerce must be "as of the application filing date." 37 C.F.R. § 2.34(a)(1)(i). "The registration of a mark that does not meet the use [in commerce] requirement is void ab initio." *Aycock Eng'g, Inc.*, 560 F.3d at 1357 (Fed. Cir. 2009) (quoting 15 U.S.C. § 1127) (citations omitted). Where an "applicant specifically states that the mark is in use in commerce that cannot be regulated by the U.S. Congress," then the applicant "has not met the statutory requirement for a verified statement that the mark is in use in commerce, and a specification of the date of first use in commerce, as defined in §45 of the Trademark Act." TMEP § 901.04.

Under Applicant's own admissions shown above, Applicant did not use the mark in commerce as set forth in his declaration. As such, Applicant's mark is void *ab initio*. *See Gay Toys, Inc. v. McDonald's Corporation*, 199 USPQ 722, 723 (CCPA 1978) (because applicant did not use the mark in commerce in association with the goods at the time it filed the application, its application was void); *Greyhound Corp. v. Armour Life Insurance Co.*, 214 UPSQ 473 (TTAB 1982) (application was void because at the time it was filed the mark had not been used in the sale or advertising of existing services). By Applicant's own admission in its pleadings, "Applicant had not used Applicant's mark in commerce that may be regulated by the U.S. Congress as of the filing date of the subject application." *Notice of Opp.* ¶13 (admitted in answer, as shown above). Mere plans for use of the mark in interstate commerce do not suffice. *See Aycock Eng'g, Inc.*, 560 F.3d at 1357 (Fed. Cir. 2009).

Conclusion and Request for Stay of Action

Applicant had no sufficient trademark use when he filed his use-based application under declaration, and he admits that he does not have use even today to sustain a federal registration. There is no genuine issue of material fact to be resolved, and the Opposer is entitled to judgment on the substantive merits of the controversy as a matter of law. There can be no federal registration without such use, and the application must be ruled void. Opposer respectfully requests such action.

Pursuant to 37 CFR § 2.127(d), TBMP 510.03(a), and the Board's inherent power to stay pending actions, Opposer requests the suspension of this action in full until the merits of the pending motion are determined. The pending motion could dispose of the entire matter, and further litigation in this matter would potentially be unnecessary.

[*valediction on following page*]

This 1st day of September 2015.

Respectfully submitted,

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v.	)	Mark: BELLA BASEMENTS
PETER PANDOLFI DBA BELLA BASEMENTS	)	Opposition No. 91222801
Applicant.	)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by FedEx courier to the correspondent of record for Applicant as follows:

Peter Pandolfi, dba Bella Basements
1007 Tenderfoot Drive
Larkspur, Colorado 80118
United States
P: (303) 660-2188

This 1st day of September 2015.